STATE OF MICHIGAN

COURT OF APPEALS

MARGARET ELAINE GEARHART, KOREEN GEARHART-HALIFAX, and RICHARD M. HALIFAX,

Plaintiffs-Appellees,

v

GERALD G. GRESLIN, a/k/a GERALD G. GRESELIN, and PEGGY A. GRESLIN, a/k/a PEGGY A. GRESELIN,

Defendants-Appellants.

UNPUBLISHED
July 7, 2000

No. 219091
Cass Circuit Court
LC No. 97-000617-CH

Before: Bandstra, C.J., and Jansen and Whitbeck, JJ.

PER CURIAM.

Judgment was entered in favor of plaintiffs following a bench trial on plaintiffs' complaint to quiet title to disputed property. After judgment was entered, defendants filed a motion for reconsideration pursuant to MCR 2.119(F), which motion was denied by the trial court. Defendants appeal as of right and we affirm.

This case arises out of a boundary dispute involving the southernmost portion of a peninsula located on Goff Lake in Cass County. Both plaintiffs and defendants claimed that they had title to the disputed portion of land. Plaintiffs filed this action to quiet title. The facts were set out by the trial court following the bench trial and neither party disputes the trial court's factual findings. Thus, we adopt a significant portion of the trial court's facts as our own:

> In this matter back in the eighteen hundreds, and I don't recall having a case that's gone back quite so far as this one, but we're back into the eighteen hundreds when the parcel in question along with all of the land the defendants now own were owned by a gentleman by the name of Abijah Huyck. In 1878 Abijah Huyck deeded to John Edward Huyck the following described parcel, which is recorded at Liber 60, page 407 of the Cass County Register of Deeds:

Commencing at the northeast corner of the south half of the southeast fractional quarter of Section 19, Township 5 south, range 13 west, and running thence west 30 rods; thence south to the lake known as Goff Lake; thence in an easterly direction following the shore of said lake to the section line on the east side of said Section 19; thence North on said line to the place of beginning, containing eight acres more or less, and this being in Marcellus Township, Cass County, Michigan.

Twelve years later in 1889, as reflected by recorded instruments, Abijah Huyck deeded the balance of his land to Allie Hudson. In the deed to Allie Hudson the deed stated: "excepted and reserved therefrom seven acres off the east side thereof now owned by Edward Huyck."

This deed establishes title in defendant's [sic] predecessors in title, and this is critical, because at the time defendants' legal description and history of title commenced plaintiff's [sic] parcel had already been conveyed away, whatever the Court determines that to be.

* * *

The plaintiffs have a good, perfected chain of title running from Edward Huyck, also known as John Huyck, who died in 1923 leaving the property to his wife, Amanda, who deeded the same to Leslie William Lundy and Ethel Lundy in 1926. In 1955 Leslie and Ethel Lundy deeded the same description to Charles and Margaret Gearhart, Charles Gearhart now being deceased . . . .

* * *

[I]n 1960 Manley Welcher and Marion Welcher obtained a tax deed, Liber 294, Page 256, to the parcel in question; however, their deed read as follows:

Commencing at the northeast corner south one-half of the southeast fractional quarter of Section 19, thence eighty rods, thence south to Goff Lake, thence Easterly along the lake shore to the section line, thence North to beginning, again, Section 19, Town 5 south, range 13 west, Marcellus Township, Cass County, Michigan.

In 1963 the Welchers deeded the parcel back to Charles and Margaret Gearhart, recorded at Liber 294, Page 257, again using the same description with eighty rods.

These deeds clearly were incorrect and contained a scrivener's error with regard to the eighty rods, when they should have said thirty rods to be consistent with earlier deeds. Obviously there was a mistake made, the three was turned into an eight, or somebody thought the three was an eight, it became eighty rods.

> In 1983, some twenty years later, this error became apparent to defendants reviewing their documents, deeds in their chain of title. They then went to Attorney Donald France to try to get that remedied. Mr. France wrote to the Gearharts requesting a deed to correct the error caused by the eighty rods versus the thirty rods in the tax deeds.
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> Relying on the representations of Mr. France and the wording of the 1983 deed that said, and I quote, "To confirm title already vested in grantees and to correct the misdescription appearing in deeds record in Liber 294, Pages 256 and 257," Mr. and Mrs. Gearhart executed a deed to the defendants, that found at Liber 431, page 181, believing that they were correcting the error caused by the tax deeds.
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> There's no doubt that the defendants were right, they needed to get those tax deeds corrected, and they did discover a mistake that was a cloud on their title, because what it effectively did was give the Gearharts more land than they were entitled to, fifty rods more, the difference between the thirty rods and the eighty rods. . . .
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> The defendants, I think, the Greslins, took the seven acres literally, and they wanted a description to reflect that they [plaintiffs] owned exactly seven acres, so they went in to Mr. France, and I think Mr. France was careless. He just took what they told him, and he did, but he didn't carefully review the abstract, he wasn't giving anybody a title opinion, he was essentially just doing what the Greslins had asked him, and I think when you look at the expression that he put in the deed, the intent is clearly expressed in the deeds that Mr. France drew and prepared where it says: "To confirm title already vested in the grantees, and to correct the misdescription."
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> I don't think Mr. France appreciated what he was doing to the southern boundary when he decided . . . to take the seven acres and to transform that into a specific description and, clearly, that is something that caused some considerable misunderstanding and later confusion.

As stated by the trial court, the deed drafted by Donald France and signed by Margaret and Charles Gearhart in 1983 changed the description of the south measurement of plaintiffs' property from "thence south to the lake known as Goff Lake" to "616 feet, more or less, North and South." The effect of the deed was that plaintiffs' land did not extend to the lake, but ended before the lake, leaving the property adjacent to the lake to defendants. In 1997, plaintiffs filed a complaint to quiet title in their favor for all land described by metes and bounds in the 1878 deed from Abijah Huyck to John Edward Huyck, which description was used in all subsequent deeds until the 1960 tax deed that contained the erroneous eighty-rod measurement. In response, defendants requested that the trial court uphold the 1983 quitclaim deeds and rely on the description in their chain of title when determining the boundaries of plaintiffs' property. Defendants maintained that plaintiffs owned only seven acres.

The trial court ruled in favor of plaintiffs, following the metes and bounds set forth in all deeds to plaintiffs' portion of land before 1960.

> Metes and bounds descriptions prevail and take priority over area or acreage descriptions. The seven acres along the east side obviously doesn't mean much except when you refer to the land owned by [John] Edward Huyck, and that's what you must do. Consulting that reference deed [1878 deed] it's clear that this property cannot be owned by defendant. . . . [A]creage is not critical, you follow the priority calls as indicated by the surveyor, and that begins with fixed monuments, followed by metes and bounds descriptions, and the last order of priority should be acreage.
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> The peninsula is and was gone in 1889. Abijah Huyck had already sold it, and it couldn't be deeded back in some fashion to Allie Hudson. The old fence corroborates the thirty-rod line demarking the line of acquiescence between the Huycks.

On appeal, defendants argue that the trial court erred when it followed the ambiguous metes and bounds description; that the trial court should have given credence to the fact that all of the deeds to defendants' property except only seven acres on the east side for plaintiffs; and that the trial court should have used an east-west fence to determine the south boundary of plaintiffs' property.

First, the metes and bounds description of plaintiffs' property was not ambiguous. In reviewing the deeds dating before 1960 and describing plaintiffs' land, there is a clear starting point from which the measurements of the property can be made, that being the northeast corner of the south half of the southeast fractional quarter of section nineteen. The metes and bounds description specifically states that the measurement is to be thirty rods west from the starting point and then south *to the lake*, not south 616 feet. From the lake, the land is to be measured east along the shore of the lake to the section line and then north along the section line to the starting point. Following this description, regardless of the actual acreage, it is clear that the entire portion of the peninsula in section nineteen was conveyed to John Edward Huyck, plaintiffs' predecessors in interest, in 1878. The trial court correctly recognized this and followed the metes and bounds description. In doing so, the trial court also noted that testimony showed that there was an old fence corroborating the thirty-rod line, which ran north and south. Because there was an unambiguous metes and bounds description, any references to acreage or area should not be given priority over that description. In so ruling, we note that defendants agree that generally monuments, courses, and distances take precedence over quantity of land. See 1 Cameron, Michigan Real Property Law (2d ed), § 5.5 (conflicts in descriptions of property are resolved in the following order: (1) monuments; (2) courses prevail over distances; and (3) quantity is the least valuable measure).

Defendants also argue that because the trial court used old north-south fence posts to determine the north-south property line on the west side of plaintiffs' property, it should also have used an old east-west fence line to determine the southern property line. This argument fails for two reasons. First, the trial court's decision makes clear that it relied on the metes and bounds description and not on two old fence posts to determine the north-south property line on the west side of plaintiffs' property. Second, there is no evidence in the record to support that there was any east-west fence running through plaintiffs' property, much less an east-west fence that could be construed as a property marker.

In an apparent attempt to remedy this problem, defendants attached affidavits to their motion for reconsideration, which purport to establish the existence of an east-west fence. Defendants argue that when the trial court was presented with these affidavits, it should have reconsidered its decision.

We note that defendants' motion for reconsideration was an improper postjudgment motion. MCR 2.119(F) is used to correct any obvious mistakes made by a court when ruling on a motion. *Bers v Bers*, 161 Mich App 457, 462; 411 NW2d 732 (1987). Defendants did not move for reconsideration of a ruling on a motion. Rather, they sought to contest the judgment entered by the trial court. They offered new evidence to support their contention that the southern portion of the peninsula belonged to them and not to plaintiffs. A postjudgment motion that offers new evidence is properly brought under MCR 2.116(A)(1)(f) and, therefore, we review defendants' motion under that court rule.

Defendants motion fails under MCR 2.611(A)(1)(f). MCR 2.611(A)(1)(f) authorizes a new trial where the substantial rights of a party are materially affected by newly discovered evidence. To support a motion for new trial on the ground of newly discovered evidence, the party so moving must demonstrate that the evidence could not have been produced through the exercise of due diligence before trial. *Krause v Krause*, 177 Mich App 184, 188-189; 441 NW2d 66 (1989); *Hauser v Roma's of Michigan, Inc*, 156 Mich App 102, 106; 401 NW2d 630 (1986).

In this case, the evidence presented by defendants in their postjudgment motion could have been discovered before trial if due diligence had been exercised. We note that defendants make no attempt to argue or persuade this Court that they could not have produced the evidence at trial. For that reason, a new trial was not warranted based on "newly discovered" evidence. Considering the evidence presented at trial, the trial court's findings of fact were not clearly erroneous, MCR 2.613(C), and its legal conclusions were not errors of law.

Lastly, we deny plaintiffs' request for attorney fees on appeal because we do not find that the appeal is vexatious pursuant to MCR 7.216(C).

Affirmed.

/s/ Richard A. Bandstra
/s/ Kathleen Jansen
/s/ William C. Whitbeck